STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 93B028

EEOC Charge No.

CCRD Charge No. S93GY001 Amended

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARY CALVILLO,

Complainant,

v.

DEPARTMENT OF HIGHER EDUCATION, UNIVERSITY OF NORTHERN COLORADO,

Respondent.

THIS AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE REFLECTS AN AMENDMENT TO THE STATEMENT OF ISSUES AND CONCLUSIONS OF LAW, ON PAGES 3 AND 13. THE DECISION ALSO REFERENCES DATES IN PARAGRAPHS 45 AND 46. CHANGES IN THE AMENDED INITIAL DECISION ARE IN BOLD CAPITAL LETTERS.

The hearing was held on November 2, 1993 and January 11, 1994 in Greeley, Colorado at the University of Northern Colorado. Respondent submitted exhibits to be made part of the record on January 25, 1994, concluding the hearing for purposes of section 24-50-125(4), CRS (1988 Repl. Vol. 10B).

Respondent appeared at the hearing through Michael Williams, Assistant Attorney General. Complainant Mary Calvillo was present at the hearing and represented by Kirk Brush, Attorney at Law. Respondent called the following employees of the University of Northern Colorado (UNC) to testify at hearing: George Jaramillo, director of public service and personnel at UNC; Teresa Solis, library assistant II; Susie Velasquez-Jojola; Mary Linscome, government publications archives librarian; Gary Pitken, dean of UNC libraries; and Dennis Hayzlett, the appointing authority and the director of personnel services. Complainant testified in her own behalf and called the following witnesses to testify at hearing: Robert E. Reeser, Phd. candidate at Colorado State University; Robert Cordova, UNC professor; and Dorothy Hinojos, an employee of UNC's Center for Research and Learning.

The parties stipulated to the admission of Respondent's exhibits 1 through 12 and Complainant's exhibits A through NNN. Respondent's exhibits 18 through 20 were admitted into evidence without objection.

PRELIMINARY MATTERS

- 1. Respondent's motion to sequester the witnesses from the hearing room was granted.
- 2. Andrew Bantham, Assistant Attorney General, entered his appearance at hearing for the limited purpose of arguing a motion to quash a subpoena served on an investigator for the Colorado Civil Rights Division. The motion was granted as the investigator's testimony was deemed to be inadmissible and irrelevant to the issues raised by this appeal.
- 3. Respondent's motion in limine was denied. Respondent moved to limit the evidence that Complainant presented at hearing to exclude all evidence related to previously imposed corrective and disciplinary actions. The Administrative Law Judge (ALJ) ruled that the evidence was admissible for the purpose of establishing evidence of Respondent's allegedly discriminatory practices.
- 4. Respondent's motion for summary judgment was denied on the grounds that Complainant's failure to deny the statement of facts contained in Respondent's prehearing statement does not constitute an admission of those facts entitling Respondent to judgment as a matter of law.
- 5. Respondent contends, and Complainant appears to agree, that Complainant was demoted and transferred from her position as a library assistant I-B at UNC to a clerical position at the affirmative action office at UNC. It is Complainant's contention that the ALJ should find that Respondent's actions were discriminatory and enter an order reinstating Complainant to her position with the UNC library. Respondent maintains that Complainant's remedy is limited to the difference in her salary from the date of the demotion to the date of her resignation from employment at UNC.
- 6. Based on the proposition that Complainant was demoted and transferred, the parties sought a ruling from the ALJ defining the remedy the could be afforded Complainant in the event she prevailed at the hearing. Based on the evidence presented at hearing, particularly Respondent's exhibit 3, which is the notice of the disciplinary action appealed here, it is clear that the nature of the disciplinary action appealed is a disciplinary termination. Complainant was not demoted. Complainant's employment was terminated and she was rehired by UNC the day following her termination to a position as a typist in the affirmative action office. Based on these facts, no ruling could be made defining the remedy available to Complainant without full consideration of the evidence presented at hearing.

MATTER APPEALED

Complainant appeals Respondent's decision to impose disciplinary action dated August 7, 1992.

ISSUES

- 1. WHETHER COMPLAINANT ESTABLISHED A PRIMA FACIE CASE OF RACE DISCRIMINATION.
- 2. Whether Complainant complied with a corrective action dated April 6, 1992 by complying, completely and promptly, with the directives and assignments of her supervisor and by providing a written apology to her supervisor.
- 3. If Complainant engaged in the conduct alleged in the August 7, 1992 letter of discipline, whether Dennis Hayzlett's decision to impose discipline was arbitrary, capricious or contrary to rule or law.
- 4. Whether the decision to terminate Complainant's employment was the choice of a sanction within the range available to a reasonable and prudent administrator.
- 5. Whether Complainant is entitled to relief.

FINDINGS OF FACT

- 1. Complainant Mary Calvillo is a hispanic female. She began her employment with UNC in May 1968. She remained employed at UNC for a total of 24 and one half years. Calvillo was 21 years old at the time of her employment at UNC. She worked in UNC's library and she remained employed there until the termination of her employment on August 7, 1992. At the time of the termination of Calvillo's employment, she was classified as a library assistant I-B.
- 2. Calvillo graduated from high school and attended Ames Community College for one year. Prior to her employment at UNC, she was employed at the Weld County Library and Mountain Bell telephone company.
- 3. Calvillo began her employment with the library in the acquisition department where she processed the mail. Calvillo remained in that position processing mail for five years. In the acquisition department, Calvillo's job duties changed and she worked on the allocation of disciplinary subjects for the professors on the UNC campus. Calvillo performed these duties for 10 and one half years.

- 4. In 1983, Calvillo was assigned to work in the cataloguing department of the library. In this position, it was Calvillo's duty to enter data into a computer system. She was supervised by Mary Linscome who was also her supervisor at the time of the termination of her employment. Calvillo remained in this position for 6 and one half years. Linscome was her supervisor for only a part of this six and one half year period. Calvillo was supervised by Pat Wallace for the remainder of her employment in the cataloguing department.
- 5. While under the supervision of Wallace in the cataloguing department, Calvillo had difficulty getting along with her coworker, Barbara Whiteman. Whiteman advised Calvillo on a daily basis that she did like hispanics. Calvillo's desk was taken away from her and she was not allowed to use the phone. Whiteman's abusive behavior occurred in the presence of Wallace. Wallace resolved conflict between Whiteman and Calvillo in Whiteman's favor.
- 6. Calvillo asked that Wallace discipline Whiteman as a result of her treatment, but Wallace took no action. Calvillo took her complaints about Whiteman to the director of UNC's affirmative action program. The director of the affirmative action office found no basis for Calvillo's claim of discrimination.
- 7. From the date of Calvillo's employment in 1968 until 1989, she was a competent member of the library staff. She performed her job duties, receiving job performance ratings of "good" or "commendable". She was not corrected or discipline during this period of her employment.
- 8. The opportunities for advancement in the library are not plentiful. Calvillo was not prevented from applying for promotional opportunities during her employment. However, she did not apply.
- 9. On October 29, 1989, Calvillo was transferred to the government documents department of the library. Calvillo remained employed in this department until the date of her termination from employment. In the government documents department, Calvillo was supervised by Linscome.
- 10. Calvillo was transferred to this section because the government documents department was put on probation by the federal government. The department was placed on probation because it did not have adequate staffing to provide an item level check in record. The federal government must authorize a library to act as a depository for government publications. The federal government maintains strict guidelines for a library to adhere to in order to maintain its status as a depository library. Failure to adhere to those guidelines can result in a depository library

being placed on probation or losing its depository status all together.

- 11. Libraries, such as UNC's library, are permitted by federal legislation to receive government publications free of cost as long as they adhere to the guidelines for maintenance of those publications. Loss of depository status would cost the library in excess of \$100,000 per year, if the Library chose to purchase the government publications previously supplied to them at no cost.
- 12. Calvillo was transferred to the government publications department to assist them in maintaining the publications. With her assistance, the department was taken off probation by the Federal government within one year.
- 13. Linscome, as the government publications archives librarian, was denied a promotion because of the department's probationary status.
- 14. During Calvillo's employment, the government publications department employed five staff members. Students worked in the department periodically. Linscome is anglo and Calvillo's full time co-worker, Teresa Solis, is hispanic. The other two employees in the department worked part time and are anglo. Linscome is supervised by George Jaramillo, the director of public services and personnel. Jaramillo is hispanic. Jaramillo was supervised by Gary Pitkin, the director of UNC libraries.
- 15. Among Calvillo's duties when she transferred to the government publications department was processing mail, assisting library patrons with reference questions, shelving materials, answering phones and other duties, as assigned. Answering reference questions was a duty Calvillo had not been previously assigned in other departments of the library. Calvillo found that in order to answer the reference questions, she had to have a thorough knowledge of government publications. Calvillo found that within two months after her assignment to the department, she had a thorough grasp of her job duties and was able to answer reference questions.
- 16. Calvillo took it upon herself to train the student workers assigned to the department when no other employee in the department did so.
- 17. Processing the mail in the government publications department was a very important part of the duties assigned to Calvillo. Properly carrying out these duties was instrumental in causing the library to be taken off of probation. Processing of mail in the government publications department required that Calvillo affix a strip to each publication so that the document could not be removed from the library without causing an alarm to be sounded.

Calvillo placed call numbers on the documents and placed the documents in alphabetical order. Calvillo was required to maintain a shipping list of the documents received and the lists were required to be kept in alphabetical order. Calvillo was also required to shelve the government publications.

- 18. In August 1991, Calvillo received her first corrective action when she attended a forum held at the Hispanic Culture Center on UNC's campus contrary to her supervisor's instruction. A new director was being selected to head the Hispanic Culture Center and three candidates for the position were to be present at the forum. Calvillo requested permission of Linscome for her and Solis to attend the forum. Linscome denied the request because there would be no staff coverage for the government publications department if Solis and Calvillo attended the forum. Student workers were not allowed to be left alone in the government publications department, except where there was an emergency and prior approval was obtained from Linscome.
- 19. Linscome was on vacation during the week in July 1991 when the forum was scheduled. She learned when she returned from vacation that Solis and Calvillo attended the forum despite her direction. She took no action to impose the corrective action until later when her supervisor, Jaramillo, learned of Solis and Calvillo's failure to comply with Linscome's direction.
- 20. Sometime after Calvillo attended the forum without Linscome's permission, Calvillo inquired of Jaramillo at a staff meeting whether Linscome had authority to prevent Calvillo from attending the forum. Jaramillo advised Calvillo that Linscome had that authority. Jaramillo made further inquiry and learned that Calvillo did not follow Linscome's direction. Jaramillo decided to impose a corrective action on Solis and Calvillo for attending the forum contrary to the instructions of their supervisor and for leaving the government publications department without a classified staff member on duty.
- 21. Jaramillo prepared a memorandum dated August 27, 1991, referencing a "Personnel Action" in which Calvillo was advised that she could not leave the government publications department with a student in charge, unless she obtains the approval of her supervisor, and that she violated the direction of her supervisor by attending the forum. Jaramillo advised Calvillo that for a thirty day period following the corrective she would be expected to follow the directions of her supervisor and not leave students in charge of the government publications department without her supervisor's authorization. Jaramillo advised Calvillo that if she failed to comply with the corrective action during a thirty day period, she would receive a disciplinary action. The corrective action further advised Calvillo that she should make an

- appointment "As Soon As Possible with Mr. Dennis Hayzlett for a meeting as provided by State of Colorado Rules and Regulations, sections (sic) 8.3.3.". (Exhibit P.)
- 22. Calvillo met with Hayzlett for the Board Rule R8-3-3 meeting on August 29, 1991. Following that meeting by letter dated August 30, 1991, Hayzlett advised Calvillo that she was receiving a corrective action for the reasons stated in Jaramillo's August 27, 1991 memorandum. (Exhibit O.)
- 23. After receiving the corrective action in August 1991, Calvillo and Linscome's relationship deteriorated. Calvillo failed to properly process the mail. Many pieces of mail had to be returned to her to be reprocessed, before it could be shelved.
- 24. During a thirty day period following the corrective action, when Calvillo was directed to strictly comply with Linscome's direction, Calvillo failed to review the government documents on the book truck. Calvillo's assignment required that she review the documents on the book truck and insure that all documents were in call number order so that a typist from the reference department could type a list of all the documents on the book truck. The list was sent to the University of Colorado, where the list was duplicated and circulated to all the other government document depository libraries. The libraries reviewed the list to determine whether they wanted any of the documents on the list. Documents which were not identified by a depository library for preservation were disposed of by the UNC library.
- 25. Calvillo failed to handle her assignment with regard to the book truck in a timely manner. Linscome assigned the book truck duty to Calvillo on September 23, 1991 and requested that she complete the task by September 27, 1991. Calvillo did not complete the assigned work until October 8, 1991. Linscome identified Calvillo's failure to comply with her direction with regard to the book truck as tardiness, but Jaramillo identified Calvillo's conduct as insubordination and as a violation of the corrective action.
- 26. As a result of Calvillo's failure to comply with the corrective action of August 1991, Jaramillo advised Calvillo in a memorandum that she would received a disciplinary action of a two day suspension from work. Calvillo was once again directed to meet with Hayzlett for a Board Rule R8-3-3 meeting.
- 27. Calvillo met with Hayzlett on November 6, 1991. Following the meeting by letter dated November 15, 1991, Hayzlett imposed on Calvillo a one day fine. Hayzlett found that the seriousness of Calvillo's actions were mitigated by the fact that she may have misunderstood the direction given to her by Linscome and that the

action giving rise to the decision to impose discipline was an isolated incident.

- 28. Linscome, on occasion, drinks alcoholic beverages during her lunch and dinner hour and then returns to work. Prior to November 1991, a library patron reported to Jaramillo that he believed Linscome was under the influence of alcohol while on the job. No action was taken against Linscome. Linscome maintains a demeanor that suggests she is under the influence of alcohol or frequently drinks heavily during her off duty hours. Her face is very drawn and her speech is difficult to understand, as though slurred by alcohol. She appears to be an individual who could be perceived to be under the influence of alcohol when she is not.
- 29. Prior to August 1991, Calvillo advised Jaramillo that Linscome appeared for work on several occasions while under the influence of alcohol. Jaramillo found no support for Calvillo's allegations. Jaramillo inquired of Solis whether she observed Linscome under the influence of alcohol and she indicated that she had not observed any such behavior. Jaramillo also inquired of Linscome whether she was drinking on the job. She denied the allegation.
- 30. In November 1991, Calvillo advised Jaramillo that Linscome appeared for work on August 14, 1991 while under the influence of alcohol and fell over her desk. Again, Jaramillo found no support for the allegation.
- 31. On December 11, 1991, Calvillo was advised in a memorandum from Jaramillo that he was recommending that she be placed on a corrective action for a period of 90 days for insubordination toward her supervisor, rude and uncooperative behavior toward coworkers, wrongful treatment of library patrons and for making slanderous statements about Linscome. Jaramillo referenced Calvillo's allegation that Linscome was under the influence of alcohol while on duty. (Exhibit V.)
- advised Specifically, Calvillo was that Jaramillo recommending the corrective action because on several occasions not refer reference questions to the appropriate government documents personnel and she involved the students in the government publications department with internal problems she was having interacting with Linscome and co-Jaramillo further advised Calvillo that recommending the corrective action because she refused to talk to co-workers, misplaced mail for the purpose of disrupting the work flow, did not deliver the mail or messages in a timely manner, slammed drawers shut in the department to disrupt work and cause discomfort to co-workers, raised her voice in the department's public area to discuss an issue with a co-worker and starred at co-workers unnecessarily.

- 33. Jaramillo's knowledge of Calvillo's conduct was based in total on Linscome's report to him. Jaramillo had no first hand knowledge of Calvillo's alleged misconduct. On December 19, 1991, Calvillo met with Hayzlett. Based on the information provided to Hayzlett by Calvillo and Jaramillo, Hayzlett decided to give Calvillo a corrective action. The corrective action was dated January 8, 1992 and covered a 30 day period, instead of the 90 day period that Jaramillo recommended. The corrective action directed Calvillo to improve her job performance in the areas noted in the memorandum from Jaramillo with regard to complying with Linscome's directions, getting along with co-workers and serving the public. The corrective action also directed Calvillo to provide Linscome with a written apology for accusing her of being under the influence of alcohol while on duty. Finally, the corrective action advised Calvillo that should she fail to comply, her employment would be terminated.
- 34. On January 21, 1992, Calvillo wrote a letter to Linscome which stated "After reading Dennis Hayzlett's, January 8, 1992, letter suggesting that I give you a written apology, I hereby apologize." This was the substance of the letter and was deemed by Hayzlett to be inadequate.
- 35. Calvillo grieved the corrective action. On January 27, 1992, Calvillo respond to a request for additional information about the grievance and advised Pitkin that she was being discriminated against. Calvillo requested that Pitkin meet with her and her attorney. Pitkin refused to meet with Calvillo's attorney because the claim of discrimination was being investigated. (Exhibit BB.) By memorandum dated January 27, 1992, Pitkin advised Calvillo that her grievance was denied.
- 36. At step three of the grievance process, a committee was assembled to hear the grievance. Calvillo appeared at the grievance hearing represented by counsel. The committee sustained Hayzlett's decision to issue the corrective action, but found that the corrective action should be changed to clarify supervisory authority, responsibility for evaluating performance, the criteria to be used to evaluate Calvillo's performance and provide Calvillo with information available to Jaramillo and Hayzlett which was pertinent to the corrective action and provide her with an opportunity to respond to that information.
- 37. Calvillo appealed the step three grievance decision to Hayzlett who, as author of the corrective action, denied her grievance. The thirty day period for corrective action had been suspended during the pendency of the grievance process and by letter dated March 27, 1992, from Hayzlett, the January 8, 1992 period of corrective action was put into effect.

- 38. On March 31, 1992, Pitkin advised Calvillo in a memorandum that he was recommending to Hayzlett that he modify the corrective action dated January 8, 1992 to incorporate the grievance committee's recommendations.
- 39. On April 1, 1992, Linscome advised Jaramillo and Calvillo of Calvillo's progress in complying with the corrective action. Linscome noted that depository materials were not timely processed during a period in February 1992, but the materials were subsequently processed and no other backlogs had occurred since then.
- 40. On April 6, 1992, Hayzlett sent Calvillo a letter in which he purported to comply with Pitkin's request to modify the corrective action of January 8, 1992 to comply with the step three grievance committee's recommendations.
- 41. By letter dated April 7, 1992, Calvillo attorney who appeared with her at the step three grievance meeting wrote to Hayzlett advising him that Calvillo was continuing with her appeal of the grievance decision and therefore the corrective action should not be modified. Calvillo's attorney advised Hayzlett that he deemed "the continued action by personnel within the University to be a form of harassment and discrimination".
- 42. On May 19, 1992, Calvillo received a job performance evaluation rating her job performance as "needs improvement". The performance evaluation advised Calvillo that she must improve her job performance in all the areas noted and that she will meet with her supervisor in 90 days to be evaluated again.
- 43. On June 4, 1992, Calvillo met with Jaramillo to discuss the fact the she believed that Linscome was assigning too much work to her and she was not giving Calvillo positive feedback. Jaramillo listened to Calvillo's concerns and advised her that he would probably set up a meeting with her and Linscome to further discuss their working relationship. Calvillo told Jaramillo that she would consult her attorney about whether she would be willing to meet with Jaramillo and Linscome. Jaramillo advised Calvillo that it was not up to her attorney whether they would meet. Calvillo advised Jaramillo that if he forced her to meet that she would not speak or participate.
- 44. On June 8, 1992, Calvillo grieved the modified corrective action. The modified corrective action incorporated the recommendations of the grievance committee that reviewed the January 8, 1992 corrective action.
- 45. On June 18, 1992, Pitkin advised Hayzlett that Calvillo did not comply with Hayzlett's corrective action of April 6, 1992 and recommended that Calvillo's employment be terminated. Based on

Pitkin's recommendation, Hayzlett scheduled a Board Rule R8-3-3 meeting with Calvillo. Following the meeting held on July 22, 1992, Hayzlett notified Calvillo that her employment would be terminated. Hayzlett believed that his notice to her **DATED AUGUST 7, 1992,** that he was terminating her employment was in fact notice that she was being transferred and demoted.

- 46. ON AUGUST 10, 1992, Calvillo accepted the new position in the affirmative action office as a typist. Calvillo lost wages in the amount of \$138.00 per month as a result of the termination of her employment and her acceptance of the position as a typist. In the affirmative action office, Calvillo was identified as a difficult employee and a troublemaker. Calvillo did not have the necessary skills to perform her job duties as a typist and refused to be trained in order to acquire the skills.
- 47. Calvillo resigned her position in the affirmative action office on December 18, 1992. Calvillo believed that she was not qualified to perform the typist duties and that she had been branded as a troublemaker and could not succeed. Calvillo inquired of a staff member in the personnel office whether there might be another position open at the UNC to which she could transfer. She was advised that there were no available positions.

DISCUSSION

A certified state employee can only be terminated for just cause as specified in Article XII, Section 13(8) of the Colorado Constitution. Colorado Association of Public Employee v. Department of Highways, et. al., 809 P2d 988 (Colo 1991). The burden of proving by a preponderance of the evidence that just cause exists for the discipline rests with the appointing authority. Section 24-4-105(7), C.R.S. (1988 Repl. Vol. 10A). The Board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103(6), C.R.S. (1988 Repl. Vol. 10B).

Complainant had the burden of proof to establish that Hayzlett's decision to terminate her employment was racially discriminatory. Complainant failed to sustain this burden. There was insufficient evidence upon which to find that Complainant was terminated from her position because of race discrimination. The ALJ considered the evidence that Complainant presented on this point. Complainant claimed that the library managers' treatment of Barbara Whiteman, an anglo employee, was different and less severe than the treatment afforded Complainant. Complainant further contended that Pitkin, Jaramillo, Solis, Linscome and Hayzlett were out to get her, were harassing her and were discriminating against her. However, the evidence does not support this.

Complainant further contended that there was an atmosphere in the library that was hostile to minorities. She maintained that this atmosphere was evidenced by the treatment of at risk teenagers who were assigned to work at the library.

The evidence established that there was a series of communications, both verbal and in writing, between Complainant and the UNC managers which were confusing and perceived by Complainant to be intended to harass her. However, there was no evidence that the actions were motivated by a desire to discriminate against Complainant on the basis of her race.

While the procedures utilized to communicate the managers' displeasure with Complainant's job performance were confusing at times, the fundamental message to Complainant was present in all the communications. Complainant was directed to comply with her supervisors instructions and to improve her job performance.

Instead of receiving this message, Complainant understood the managers to be instructing her to work with people she found very difficult to get along with, to follow the direction of a supervisor that she felt was not capable and to work effectively in an organization that she perceived to be hostile toward her because of her race.

It appears to this ALJ, based on the parties' evidence contained in Exhibits 3 and EEE, that in no uncertain terms Complainant was advised in a letter dated August 7, 1992, that she was being terminated from her position with the library. This is the document upon which Complainant based her decision to appeal to the State Personnel Board and it is upon this disciplinary action that the ALJ has exercised her jurisdiction to consider the appeal.

Why the parties appeared at hearing and referred to the August 7, 1992 disciplinary action as a demotion and transfer can only be left to speculation. There was testimony that Hayzlett did not think Complainant's conduct warranted termination and intended to transfer Complainant to another position. There was further testimony that UNC vice president in charge of public relations advised Complainant her employment was not to be terminated and that is why she was allowed to transfer to the position in the affirmative action office.

In Hayzlett's August 7, 1992, letter notifying Complainant of the termination of her employment, he states,

Mr. Pitkin states that you failed to comply, completely and promptly, with the directives and assignments of your supervisor, Mary Linscome and did not provide an adequate written apology to Ms. Linscome as required by

the corrective action....

- 1) You will be terminated from your employment as a Library Assistant I-B, in position #178, as of the end of the normal working hours today, Friday, August 7, 1992.
- 2) On Monday, August 10, 1992, Mr. Carvajal [UNC's Vice President in charge of public relations] will accompany you to interviews for possible full or part-time positions with the Hispanic Cultural Center, Continuing Education and the North Central Association....

Once assigned to the affirmative action office, Complainant was assigned duties that she had not been required to perform in the 24 years of her employment in the library. The testimony of the witnesses established that her supervisor in the affirmative action office asked her to receive training, but complainant declined the opportunity to be trained.

Based on the evidence presented by the parties, it appears that Complainant's misconduct which formed the basis of the decision to discipline her was not so serious as to justify termination. While Complainant and the library managers' emotions escalated, during the months of April through August 1992, Complainant's actions in failing to write an adequate letter of apology to Linscome and failing to comply with her supervisors direction were mitigated by a number of factors.

These factors included the fact that Complainant worked for the library for approximately 21 years during which she received "good" or "commendable" job performance ratings. Linscome appeared to be an ineffective supervisor who clouded the performance issues rather than clarified them for Complainant. In order to make up for Linscome's lack of competence as a supervisor, Jaramillo, Pitkin, and Hayzlett step in to direct Complainant which intensified her perception that she was being harassed and discriminated against.

Complainant's employment status was further confused when her employment was terminated, but she was advised that she was being transferred and demoted.

The ALJ found it extremely difficult to discern why the employment relationships in the library soured so dramatically, but it cannot be concluded that a 24 year career at the library should be discard in an approximate a one year period, where there is evidence of inept management.

The issue is raised as to the nature of the remedy to which Complainant is entitled. The evidence established that Complainant was placed in a position for which she lacked the necessary qualifications. Thus, she was doomed to failure when her

experiences of the preceding year were combined with her inability to perform the assigned new duties and her suspicions that she was being forced out of the library. It cannot be concluded that her resignation from the affirmative action office was voluntary. It was clearly an extension of the wrongful termination which occurred August 7, 1992.

CONCLUSIONS OF LAW

1. THE EVIDENCE PRESENTED AT HEARING FAILED TO ESTABLISH A PRIMA FACE CASE OF RACE DISCRIMINATION.

- 2. The evidence established that Complainant did not comply with corrective action of January 8, 1992, as amended on April 7, 1992.
- 3. Complainant violated the corrective action of April 7, 1992 and therefore it was neither arbitrary or capricious or contrary to rule or law to impose a disciplinary action on her on August 7, 1992
- 4. Because of the mitigating circumstances of Complainant's long years of good job performance, and the difficult and confusing management style utilized from August 1991 to August 1992, the decision to terminate Complainant's employment is the choice of a sanction which was not within the range available to a reasonable and prudent administrator.
- 5. Since Complainant's resignation from the affirmative action office is a direct result of her wrongful termination from the library and was not voluntary, Complainant is entitled to reinstatement to her position as a library assistant with full back pay and benefits from the date of her termination to the date of her reinstatement, less any wages and/or benefits received during this period.

ORDER

Complainant shall be reinstated to her position as a library assistant I-B and awarded full back pay and benefits from the date of her termination to the date of her reinstatement, less any wages and benefits received.

Dated this 16th day of March, 1994, at Denver, Colorado.

Margot W. Jones Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of March, 1994, I placed true copies of the foregoing **AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Kirk Brush Attorney at Law 215 West Oak, Suite 500 Fort Collins, CO 80521

and through the inter-agency mail, addressed as follows:

Michael Williams Assistant Attorney General Department of Law Human Resources Section 1525 Sherman Street, 5th Floor Denver, CO 80203